Supreme Court, U.S.
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No.

In the Supreme Court of the United States

CARLO DONATO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court resentencing a criminal defendant after remand may sentence the defendant de novo when the appellate court did not specify limits on the scope of resentencing.

RULE 29.6 STATEMENT

Petitioner Carlo Donato is a private party.

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PETITION FOR A WRIT OF CERTIORARI

Carlo Donato respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit (App., *infra*, 1a-27a) is reported at 306 F.3d 1217. The judgment of the district court upon resentencing is unreported and is set out at Pet. C.A. App. 20-24. The earlier opinion of the Second Circuit remanding the case for resentencing is unreported. App., *infra*, 28a-33a.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2002. On December 13, 2002, Justice Ginsburg extended petitioner's time to file the petition to and including February 6, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

18 U.S.C. § 3742 provides, in relevant part:

> (f) Decision and disposition.—If the court of appeals determines that the sentence—

> (1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

STATEMENT

This case, which presents what the Second Circuit described as "knotty questions that emerge when an appeal results in a remand for resentencing" (App., *infra*, 2a), implicates a clear and acknowledged split of authority on an important and recurring issue. The question is "whether a remand for resentencing should be limited or *de novo* absent explicit direction from the remanding court." *Id.* at 14a n.6. The Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits follow a de novo rule in such circumstances. The First, Fifth, Seventh, and D.C. Circuits, on the other hand, severely circumscribe a district court's power to consider sentencing issues beyond those upon which the remand was based, absent specific authorization from the court of appeals.

The Second Circuit in this case noted the circuit split, and then crafted its own rule that straddles the division of authority and creates even further confusion and disunity among the courts of appeals. Review by this Court is necessary in order to establish uniformity on a significant and persistent question of federal criminal procedure that bears directly on the proper allocation of sentencing authority between the district courts and the courts of appeal.

A. Proceedings Culminating In Petitioner's Resentencing

Petitioner Carlo Donato was charged with a series of carjackings committed in 1993 and 1994. In each instance, the carjacker had walked up to or entered the victim's car, dis-

played a handgun, and then driven off with the victim's car. After a trial petitioner was found guilty of one count of conspiracy to commit carjacking (18 U.S.C. § 371), six counts of carjacking (18 U.S.C. § 2119), and six counts of using a firearm in furtherance of a crime of violence (18 U.S.C. § 924(c)). App., *infra*, 4a.

At petitioner's initial sentencing, the district court sentenced petitioner to 168 months on the conspiracy and carjacking counts. The court also sentenced petitioner to five years for the first firearms count and twenty years for each remaining firearms count. Because these sentences were required to run consecutively, petitioner's total term of imprisonment was 119 years. He was also sentenced to three years of supervised release, a $175,000 fine, and $295,807.25 in restitution. App., *infra*, 4a-5a.

On direct appeal, the Second Circuit affirmed petitioner's convictions in an unpublished order. App., *infra*, 34a-37a. Petitioner then filed a *pro se* motion under 28 U.S.C. § 2255 attacking his convictions and his sentence. The district court denied relief but granted a certificate of appealability. The Second Circuit, in an unpublished order, see App., *infra*, 28a-33a, rejected most of petitioner's arguments but agreed with him that "there may have been improper double counting if the district court increased the offense level for the conspiracy count because of the firearm possession charged as an overt act" in addition to sentencing petitioner for possession of the same firearm under section 924(c). *Id.* at 33a.

The court concluded, "We therefore remand to the district court for resentencing in light of this order, without prejudice to the government submitting an argument to the district court explaining why this was not double-counting." App., *infra*, 33a.

On remand for resentencing, the government conceded that petitioner's offense level had been improperly increased

as the result of "double counting." App., *infra*, 6a. Petitioner also raised other issues at resentencing. He sought a downward departure and argued error in the determination of the sentence. *Id.* at 7a. The district court corrected the offense level to eliminate the conceded double counting but rejected petitioner's other arguments. It then sentenced him to 120 months on the conspiracy and carjacking counts, again to run consecutively with his firearms sentences, producing a total sentence of 115 years. Petitioner appealed, and, both through counsel and *pro se*, argued that the district court had erred in rejecting his arguments at the resentencing. *Id.* at 7a-8a.

B. The Second Circuit's Decision

A central question on appeal was whether, in light of the Second Circuit's earlier remand order, some or all claims now raised by petitioner were barred by waiver or the law of the case doctrine. Because the earlier remand had not specified that issues beyond the question of double counting were foreclosed, the court of appeals had to determine whether such a general remand should limit the issues that parties can raise before the district court on remand. App., *infra*, 8a-9a. The Second Circuit noted that "[t]he circuits are divided as to" this question. *Id.* at 14a-15a n.6.

The court of appeals observed that a "sentence is based on the constellation of offenses for which the defendant was convicted and their relationship to a mosaic of facts, including the circumstances of the crimes, their relationship to one another, and the other relevant behavior of the defendant," *Id.* at 13a. It then held that because of this interrelationship of factors, when a *conviction* is overturned on appeal, the resentencing on remand should be de novo, allowing the district court to consider any and all facts "anew." *Id.* In contrast, the court held that "absent explicit language in the mandate to the contrary, resentencing should be limited when the Court of Appeals upholds the underlying

convictions but determines that a *sentence* has been erroneously imposed." App., *infra*, 14a (emphasis in original).

The court of appeals then explained the consequences of its determination that a remand after vacatur of a sentence is limited. In a limited remand, "the law of the case ordinarily prohibits a party, upon resentencing or an appeal from that resentencing, from raising issues that he or she waived by not litigating them at the time of the initial sentencing." App., *infra*, 16a. The Second Circuit allowed for three exceptions. First, if a party did not "have both an opportunity and an incentive to raise" an issue, the issue is not considered waived and may be raised on remand even if it was not raised before. *Id.* at 16a. Second, "an issue may be raised if it arises as a result of events that occur after the original sentence." *Id.* at 17a. Third, the court recognized an exception to law of the case when "cogent" and "compelling" reasons dictate. *Id.* at 18a (citing changes in controlling law, new evidence, clear error, or manifest injustice).

The court then applied its holding to petitioner, finding several of his arguments foreclosed by the limited scope of the remand. It therefore refused to address petitioner's claim that "the district failed to consider the required factors before imposing restitution and a fine" (App., *infra*, 19a), his claims that "his sentence violates the Eighth Amendment and the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)" (App., *infra*, 20a), his claim that "the district court violated U.S.S.G. § 2K2.4 by increasing his offense level on the carjacking and conspiracy counts to account for 'special offense characteristics'" (App., *infra*, 20a), and (to the extent not based on matters that occurred after the initial sentencing) his claim that the district court erred in refusing to depart downward (App., *infra*, 21a). The court did address other arguments that petitioner raised, concluding that those arguments were based on events after the initial sentencing or were within the scope of the limited remand. App., *infra*, 21a-22a. The court ulti-

mately affirmed petitioner's sentence of imprisonment but reversed the fine and remanded for imposition of a lawful fine. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The circuits are hopelessly divided by a widely acknowledged and persistent split concerning whether, absent specific authorization to do so from the appellate court, a district court can resentence a defendant de novo. Six circuits hold that a remand in which the court of appeals specifies no limits to the scope of resentencing does not disturb the discretion of the district court to fashion any sentence consistent with the holding of the appellate court. Four circuits hold the contrary. The Second Circuit's decision, which stakes out yet a third position, only deepens the confusion.

There can be no doubt that the question over which the circuits are split is consequential: a defendant's ability or inability to present all relevant evidence and arguments at resentencing can have a profound impact on the punishment he receives.

There should be no doubt, as well, that the decisions (including the Second Circuit's) that reject default de novo resentencing are misguided. In the federal system, the imposition of a criminal sentence upon a convicted defendant has long been the duty and, until relatively recently, the virtually exclusive responsibility of district courts. Under current federal law, although sentences may be appealed, sentencing remains the primary responsibility of district courts. See generally 18 U.S.C. § 3742. This is because, among other things, "[d]istrict courts have an institutional advantage over appellate courts in making [discretionary sentencing] determinations." *Koon* v. *United States*, 518 U.S. 81, 98 (1996). The discretionary nature of criminal sentencing, the institutional competence of district courts, and the fact that a criminal sentence is a package in which various factors inevitably are interdependent, all counsel against a

presumption that would constrain a district court's authority to fashion an appropriate sentence for a given offender. While there may be cases in which a court of appeals reasons that a limited remand will not upset the sentencing calculus of the district court, in those cases the court of appeals should bear the minimal burden of making that reasoning explicit. Appellate review should not, *sub silentio*, invert the ultimate responsibility for setting a sentence.

The de novo approach also is the only approach that is consistent with traditional (and literal) understandings of the meaning of vacatur. A vacatur is said to wipe the slate clean. See *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996). That supposition cannot be squared with a rule under which remands after vacatur are presumed to be limited.

Finally, de novo resentencing upon remand advances the goal of judicial economy. The contrary regime encourages a litigant to raise, in an excess of caution, every conceivable issue at his original sentencing, including those that have absolutely no impact on his sentence, lest he be barred from asserting those issues at a subsequent resentencing. The limited remand approach engenders further inefficiency by burdening district courts with the often surprisingly difficult task of parsing appellate courts' mandates to determine which issues are and which issues are not within the scope of the limited remand. The rule adopted by the six de novo remand circuits, on the other hand, provides for clarity even when the appellate court chooses to limit the resentencing, by requiring the court in such instances to make explicit the scope of the remand.

This Court should therefore should grant the petition, to establish uniformity on this important issue of federal criminal procedure, and, for reasons discussed in greater detail below, should reverse the judgment of the Second Circuit.

I. THE CIRCUITS ARE SHARPLY DIVIDED OVER THE PROPER SCOPE OF RESENTENCING FOLLOWING A GENERAL REMAND

As the Second Circuit acknowledged, "[t]he circuits are divided as to whether a remand for resentencing should be limited or *de novo* absent explicit direction from the remanding court." App., *infra*, 14a n.6. Indeed, with the Second Circuit's holding in this case, eleven circuits have now ruled on this issue, and their positions are widely divergent.

The Third, Sixth, Eighth, Ninth, Tenth, and Eleventh circuits hold that the proper presumption is one of de novo resentencing. See, *e.g.*, *United States* v. *Faulks*, 201 F.3d 208, 210 (3d Cir. 2000); *United States* v. *Jennings*, 83 F.3d 145, 151, *amended*, 96 F.3d 799 (6th Cir. 1996); *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992); *United States* v. *Ponce*, 51 F.3d 820, 826 (9th Cir. 1995); *United States* v. *Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996); *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996).[1]

A representative decision from the courts applying the de novo resentencting rule is *United States* v. *Campbell*, 168 F.3d 263 (6th Cir. 1999).[2] In *Campbell*, the defendant was convicted of offenses related to the distribution of cocaine.

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[1] Of these circuits, the Eighth Circuit (counterintuitively) limits de novo reconsideration of issues to "any relevant evidence * * * that [the court] could have heard at the first hearing." *United States* v. *Cornelius*, 968 F.2d at 703, 705 (8th Cir. 1992). Note also that although most of the cases applying this rule involve direct appeals from sentencing, some involve, as in petitioner's case, resentencing as a consequence of a § 2255 motion. See *United States* v. *Saikaly*, 207 F.3d 363, 369 (6th Cir. 2000); *United States* v. *Rudolph*, 190 F.3d 720, 726 (6th Cir. 1999).

[2] *Campbell* also provides a discussion of the distinction between a general remand (which implicates this circuit split) and an explicitly limited remand (which does not). 168 F.3d at 266-268.

Two years into his sentence, the district court, invoking Fed. R. Crim. P. 32.1(b), ordered his fine due and payable immediately. 168 F.3d at 264. Campbell appealed, and the Sixth Circuit reversed and remanded for a hearing on Campbell's assets and financial situation to be followed by a resentencing. *Id.* at 265. On remand, Campbell "sought to expand the scope of resentencing" by arguing that amendments to the Sentencing Guideline required recalculation of the drug quantity attributed to him. *Id.* The district court found Campbell's argument beyond the scope of the remand. The Sixth Circuit reversed. The court surveyed the circuit split, noting that the Sixth Circuit followed the "basic rule that a district court can review sentencing matters de novo unless the remand specifically limits the lower court's inquiry." *Id.* The court observed that "[t]he policy underlying the presumption of de novo resentencing is to give the district judge discretion to consider and balance all of the competing elements of the sentencing calculus." *Id.* at 266.

The First, Fifth, Seventh, and D.C. circuits, on the other hand, hold that the proper presumption is one of limited remand. See, *e.g.*, *United States* v. *Ticchiarelli*, 171 F.3d 24, 32-33 (1st Cir. 1999); *United States* v. *Marmolejo*, 139 F.3d 528 (5th Cir. 1998); *United States* v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996); *United States* v. *Whren*, 111 F.3d 956, 957 (D.C. Cir. 1997).[3]

A representative case from the circuits applying the limited remand rule is *Marmolejo*, the leading Fifth Circuit case.

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[3] The Fourth Circuit appears to have no definite position on this issue. In *United States* v. *Bell*, 5 F.3d 64, 66-67 (4th Cir. 1993), the Fourth Circuit distinguished *United States* v. *Smith*, 930 F.2d 1450, 1456 (10th Cir. 1991), which adhered to the de novo approach. *United States* v. *Aramony*, 166 F.3d 655, 662-663 (4th Cir. 1999), however, affirmed a district court's imposition on resentencing of a sentence enhancement that the court had not considered at the original sentencing.

In *Marmolejo*, the defendant was convicted of various drug, money laundering, and bribery charges. On appeal and cross-appeal by the government, the Fifth Circuit found merit in the government's appeal and remanded for resentencing. At resentencing, Marmolejo sought to introduce new evidence relevant to issues that had been addressed in his initial sentencing, but the district court refused to hear it. 139 F.3d at 529-530. The Fifth Circuit affirmed after noting the circuit split on the issue. *Id.* at 530. The court held that the issues Marmalejo raised had not been properly before the district court on remand; the only cognizable issues were "those issues arising out of the correction of the sentence ordered by this court. * * * All other issues not arising out of this court's ruling and not raised before the appeals court, which could have been brought in the original appeal, are not proper for reconsideration by the district court below." *Id.* at 531.[4]

Now the Second Circuit has weighed in with something of a hybrid rule, pursuant to which a general remand will be considered de novo if on appeal the court reverses one or more convictions, but limited if on appeal the court reverses only the sentence imposed. App., *infra*, 14a.

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[4] Adding to the confusion among the circuits is the instability of the rules within some of the circuits. For example, in a case subsequent to *Marmalejo*, the Fifth Circuit appeared to carve out an exception to its strict rule presuming limited remand. In *United States* v. *Matthews*, 312 F.3d 652 (5th Cir. 2002), it upheld the imposition of a new sentencing enhancement upon remand in circumstances where a remand for resentencing had been necessitated by *Apprendi*-type error. *Id.* at 659 (resentencing should be de novo when original sentence was based on conviction for aggravated offense when aggravating factors were not charged in indictment or proven to petit jury).

The division among the circuits is as clear as the law is confusing. Only this Court is in a position to resolve it.[5] This well developed conflict should not be permitted to persist any longer.

II. THE ISSUE IS IMPORTANT AND RECURRING

The issue presented by the circuit split is of substantial importance to criminal defendants, prosecutors, and the federal courts. It affects the ability of defendants to raise issues on resentencing that may have a profound impact on their sentences. Because some circuits favor limited remands while other circuits favor de novo remands, a defendant's opportunities to obtain a less severe sentence on remand can depend upon arbitrary lines of judicial geography. Indeed, the limited-remand approach impairs the ability of prosecutors, too, to seek enhancements or departures that they believe may be necessary to achieve a proper sentencing range on resentencing, especially when such departures or enhancements would not have been appropriate in the initial sentencing.

Further, the courts themselves are affected, in several ways. The issue implicated by the circuit split is relevant to a large part of the federal judiciary's caseload. Over 90 percent of federal criminal appeals involve sentencing issues, and the courts of appeals remand well over 200 criminal appeals to the district courts each year. See Mecham, *2001 Annual Report of the Director* Tables B-5, B-6 (Administrative Office of the U.S. Courts), *available online at* <http://www.uscourts.gov/judbususc/judbus.html>. The dis-

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[5] This is not, for example, a matter within the authority of the Sentencing Commission to address. Cf. *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (declining to resolve a circuit split in the interpretation of a provision of the Sentencing Guidelines because the Sentencing Commission has the power and responsibility to do so).

pute also reflects competing views about the appropriate distribution of responsibility between district and appellate courts to decide which sentencing elements, including discretionary elements, are affected by an appellate court's decision on a question of law. De novo resentencing permits a district court to determine on remand which issues not addressed by the appellate court it must revisit because of the court of appeals' ruling; a presumption that remands should be limited preempts the role of the district courts and places greater emphasis on the power of courts of appeals.

By virtue of its position at the apex of the federal judicial system, this Court has "the prime responsibility for the proper functioning of the federal judiciary." Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 252 (8th ed. 2002). Thus the Court has readily granted certiorari where lower courts' rulings constitute a "threat to the goal of uniformity of federal procedure." *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965). In particular, questions implicating the relative institutional competencies of federal trial and appellate courts are a subject that this Court has found well worthy of review. In *Pierce* v. *Underwood*, 487 U.S. 552, 559-560 (1988), for example, this Court's decision turned on "a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[6] See also *Cooper Industries,*

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[6] *Underwood* involved a lawsuit by tenants of government housing against the Secretary of Housing and Urban Development. The district court awarded the plaintiffs attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), because the Secretary's position was not "substantially justified" within the meaning of the Act. 487 U.S. at 555. The relevant question presented in *Underwood* was the proper standard of review of the district court's decision. This Court held that "deferential review" under an abuse of discretion standard was appropriate because of the fact-intensive, case-specific, and context-dependent nature of the "substantially justified" inquiry. *Id.* at 560-563.

Inc. v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (adopting de novo standard of appellate review of the constitutionality of punitive damages awards after assessing the "[d]ifferences in the institutional competence of trial judges and appellate judges"); *Salve Regina College* v. *Russell*, 499 U.S. 225, 233 (1991) (noting that this Court's decisions on appellate standards of deference "reflect an accommodation of the respective institutional advantages of trial and appellate courts").

"Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing * * * standards of procedure and evidence." *McNabb* v. *United States*, 318 U.S. 332, 340 (1943). See also *Carlisle* v. *United States*, 517 U.S. 416, 417-418 (1996) (explaining that certiorari had been granted to consider the power of a district court to grant an untimely motion for judgment of acquittal); *Thermtron Products* v. *Hermansdorfer*, 423 U.S. 336, 341-344 (1976) (explaining that certiorari had been granted to consider the power of a district court to deny removal from a state court because the district court's docket was too heavy); Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 252-254 (8th ed. 2002) (describing the Court's exercise of its supervisory power concerning federal jurisdictional and procedural issues). Review on that basis is fully warranted here.

III. RESENTENCING SHOULD BE DE NOVO

A. Only De Novo Sentencing Is Consistent With The Discretionary Nature Of Criminal Sentencing And the Interdependence Of Sentencing Factors

Federal law has always committed the discretionary aspects of criminal sentencing to the district judge. See *Williams* v. *United States*, 503 U.S. 193, 205 (1992) (Sentencing Reform Act of 1984 "did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion."); *Dorszynski* v. *United States*, 418 U.S. 424, 431

(1974) ("once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"). Even in the Guidelines era, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Williams*, 503 U.S. at 205.

This baseline understanding reflects the fact that a criminal sentence is the product of the interplay of myriad factors, factors that the district court is uniquely suited to evaluate. See *Koon* v. *United States*, 518 U.S. 81, 98 (1996) ("District courts have an institutional advantage over appellate courts in making [discretionary sentencing] determinations."); *Campbell*, 168 F.3d at 268 ("Calculation of a sentence under the Sentencing Guidelines requires a balancing of many related variables. These variables do not always become fixed independently of one another.").

Thus, "[t]he policy underlying the presumption of *de novo* resentencing is to give the district court discretion in balancing all the competing elements of the sentencing calculus." *United States* v. *Saikaly*, 207 F.3d 363, 369 (6th Cir. 2000); *accord, Stinson*, 97 F.3d at 469; *Moore*, 83 F.3d at 1234-35.[7] The courts favoring de novo remands defer to the

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[7] Creating implicit limits on resentencing could also affect the exercise of prosecutorial discretion. A limited remand rule may "unduly restrict the prosecution's discretion and expose the criminal defendant to unnecessarily harsh sentences." *Matthews*, 312 F.3d at 660 n.8. As the court in *Matthews* posited, prosecutors might avoid seeking a sentencing enhancement when they believe that it would make a sentence excessively harsh, although the sentence for a lesser included offense is too lenient without the enhancement. If the prosecution is prevented from seeking the enhancement in the event that the conviction is reversed and the case remanded for sentencing on the lesser included offense, then prosecutors will have to seek every enhancement at the initial sentencing, which will lead to excessive sentences. *Id.*

long judicial tradition that treats sentencing as the unique province of the district court, a matter committed to the discretion of trial judges, fact-intensive, irreducible to formula, and ill-suited for appellate review. Cf. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (in context of Fed. R. Civ. P. 11, the district court is "best situated to determine when a sanction" will serve "specific and general deterrence"); *Pierce*, 487 U.S. at 560-561 ("the district court may have insights not conveyed by the record" and has "full knowledge of the factual setting"); Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 663-664 (1971) (arguing that because the trial judge "sees more and senses more" than appellate judges, the trial judge should be accorded discretion in determinations that are "based on facts or circumstances * * * that the record imperfectly conveys") (emphasis omitted). In other words, underlying the de novo rule is the sense that appellate courts are poorly qualified to perform surgery on sentencing decisions, removing offensive portions while safely leaving the remainder intact.

When reversing a sentence, a court of appeals cannot lightly assume that it can excise legal error from a district court's sentencing determination without affecting discretionary elements of that determination. Disturbing the balance of factors achieved by the district court requires that the district court have another opportunity to consider the new set of factors as a whole. See *Faulks*, 201 F.3d at 210 n.1 (noting that remand on a single issue provided "additional facts on which the discretionary aspects of [the sentencing court's] decision could be based"); *Campbell*, 168 F.3d at 268 ("When this court issues a limited remand, it must make certain that reconsideration of the issues remanded will not alter the proper calculation of other sentencing variables outside the scope of the remand."). As this Court has stated, "it is the prerogative of the district court, not the court of appeals, to determine, in the first instance, the sentence that

should be imposed in light of certain factors properly considered under the Guidelines." *Williams*, 503 U.S. at 205.

Despite this fact, courts rejecting the de novo rule have dismissed arguments that the "close relationship" between issues addressed on appeal and other sentencing issues permits district courts to address those related issues on remand. See, *e.g.*, *Marmalejo*, 139 F.3d at 531-32 (rejecting the contention that the fact that a sentencing issue is "intertwined" with the issue decided on appeal could "resuscitate the issue *de novo*"). While there may be cases where a court of appeals reasons that a limited remand will not upset the sentencing calculus of the district court, in those cases the court of appeals should bear the minimal burden of making that reasoning explicit and describing the contours of the limited remand in express terms. Appellate review should not be *presumed* to strip a district court of the ultimate responsibility for setting a new sentence.

B. Only De Novo Sentencing Is Consistent With The Nature Of Vacatur And Case-Specific Sentencing

Sentencing de novo is consistent with the literal concept of vacatur, which renders the sentence a nullity. See *Stinson*, 97 F.3d at 469 (on remand, the sentence is "wholly nullified, and the slate wiped clean"). This Court long ago noted that "vacating the former judgment" in a case will "render it null and void, and the parties are left in same situation as if no trial had ever taken place in the cause." *United States* v. *Ayres*, 76 U.S. (9 Wall.) 608, 610 (1869).[8] This is particularly appropriate in the context of sentencing, because "the district court [is] required to resentence [the defendant] in light of the circumstances as they st[and] at the time of his resentencing." *Werber* v. *United States*, 149 F.3d 172, 178

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[8] One distinguished jurist has referred to a vacated opinion as "a ghost. * * * [It] no longer exists." *Okpalobi* v. *Foster*, 244 F.3d 405, 432 (5th Cir. 2000) (en banc) (Higginbotham, J., concurring).

(2d Cir. 1998). See also *Moore*, 83 F.3d at 1235 (vacatur of sentence places defendant in the position of a convicted defendant about to be sentenced for the first time).

C. Only De Novo Sentencing Is Consistent With The Goal Of Judicial Economy

1. Litigation Of Unnecessary Issues

If parties face uncertainty about the scope of the issues they will be permitted to raise on remand, they will have incentive to raise in the initial sentencing every conceivable issue that could be relevant on remand. That amounts to a colossal waste of resources. The court in *Jennings* (a case in which the defendant sought to raise the issue of "relevant conduct" at resentencing) put it well:

> At the original sentencing, the relevant conduct was *irrelevant* to the determination of the defendant's base offense level. Were we to establish a rule precluding subsequent inquiry upon remand into such findings, then defendants would be forced to litigate every aspect of the sentencing report in the original hearing, even though irrelevant to the immediate sentencing determination in anticipation of the possibility that, upon remand, the issue might be relevant. Such 'front-loading' would unnecessarily increase the burden on district courts and this court. In the interest of judicial economy it will not be required.

83 F.3d at 151. De novo resentencing thus promotes judicial efficiency by avoiding litigation of unnecessary issues. Cf. *Salve Regina College*, 499 U.S. at 231 (fashioning rule of

appellate review to "serve[ ] the dual goals of doctrinal coherence and economy of judicial administration").[9]

2. Relitigation Of Issues

Courts often defend the limited-remand rule by arguing that it prevents the relitigation of issues. These arguments generally dovetail with incantations of the law of the case doctrine. See, *e.g.*, *Matthews*, 312 F.3d at 657. A frequent metaphor is the "second bite at the apple." *Marmalejo*, 139 F.3d at 531. These concerns, while legitimate, are overstated.

First, because upsetting the sentencing calculus changes the incentives of the parties, litigation of new or dormant issues on remand is virtually inevitable in many cases. As noted *supra*, at note 9, some courts invoking waiver state that

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[9] The Second Circuit, and some courts following the limited remand rule, attempt to address this concern by allowing a party to raise issues on remand that they did not have "both an opportunity and an incentive to raise" earlier. App., *infra*, 16a. See also *Tichiarelli*, 171 F.3d at 32-33; *Whren*, 111 F.3d at 960. While this approach could reduce "front-loading," it cannot eliminate it. There is inherent uncertainty about which issues will or will not be considered waived, and it is aggravated by the fact that some cases determining whether a defendant had incentive to raise an issue have looked to whether an issue would affect the defendant's offense level, see *Ticchiarelli*, 171 F.3d at 33 (holding that one challenge to method of calculating drug weight was not waived when, prior to resentencing, offense level would be no different under corrected weight), while other cases have employed less direct methods, see *United States* v. *Hass*, 199 F.3d 749 (5th Cir. 1999) (rejecting claim that defendant had no incentive to raise an argument earlier when he raised the issue in the district court but did not appeal it). Cautious litigants thus have every incentive to "front-load" issues as to which there is even arguable ambiguity. Moreover, rules such as the Second Circuit's have the undesirable side effect of generating needless satellite litigation about which issues parties did or did not have an incentive to raise.

a party will not be held to have waived an argument if it had no incentive or ability to raise the issue in the initial sentencing or appeal. See, *e.g.*, *Tichiarelli*, 171 F.3d at 32-33; *Whren*, 111 F.3d at 960. Occasionally, however, a court flatly states that issues not raised in the initial sentencing and appeal are waived and cannot be raised thereafter. See *Parker*, 101 F.3d at 528.[10]

Second, opinions expressing worries about relitigation fail to recognize that a district court on remand has the power (and the incentive) to pretermit unnecessary relitigation of issues. Nothing prevents a district court on resentencing from holding that prior submissions of fact and law are sufficient when there is no reason perpetuate consideration of an issue. The Tenth Circuit has made precisely this point:

> [T]he vacation of [defendant's] sentence required the district court to exercise its inherent discretion to determine the appropriate scope of the resentencing proceedings. * * * It could be that on remand, the district court will determine that common sense and efficiency dictate sentencing *de novo*. On the other hand, in the exercise of its discretion, the district court could resolve not to entertain new arguments and evidence and simply rely on the original briefing and arguments.

Moore, 83 F.3d at 1235.

3. Costs Of Interpreting Mandates

One factor affecting judicial efficiency that courts on all sides of the split have largely ignored is the cost—in time and effort and, most importantly, risk of error—that a rule

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[10] The fact that certain sentencing issues are not appealable (*e.g.*, denials of departures) complicates any simplistic application of waiver analysis. See *Stinson*, 97 F.3d at 469.

presuming limited remands imposes on district courts. Despite rhetoric about efficiency, cases adopting the limited remand rule acknowledge that interpreting the limits to general mandates can be a demanding process. See *Ticchiarelli*, 171 F.3d at 33 ("This approach requires a fact-intensive, case-by-case analysis."); *Parker*, 101 F.3d at 528 ("the scope of the remand is determined not by formula, but by inference from the opinion as a whole"). Indeed, in petitioner's case, the Second Circuit recognized that its rule requires an amorphous, open-ended inquiry. See App., *infra*, 12a ("to determine whether remand is *de novo*, we must look to both the specific dictates of the remand order as well as the broader spirit of the mandate.") (internal quotation marks omitted).

In the face of an ambiguous mandate, it is much less costly to adhere to a default rule that calls for de novo sentencing than to scrutinize the entire opinion for clues about which issues are foreclosed and which issues are not. *Campbell* expressed it this way: "The goal of achieving judicial economy through the use of limited remands becomes futile if appellate court drafting imprecision too frequently results in parties appealing the scope of the remand itself." 168 F.3d at 268. Put another way, it saves the time and energy of district judges and trial lawyers—and makes a lot more sense—to read a mandate that lacks any express limitation to be unlimited, rather than search it for implied limitations.

This rule does not constrain the power of an appellate court to define its mandate. Courts ruling that their earlier remands were not limited have found it obvious that "[h]ad the court [in the earlier appeal] sought to limit the scope of the district court's authority on remand, it could easily have done so." *Ponce*, 51 F.3d at 826. See also *Matthews*, 312 F.3d at 660 ("if we had intended only a ministerial resentencing, we could have reversed and rendered the fifteen-year sentence to save everyone involved time, expense, and effort. That we did not reverse and render indicates that we intended the district court to engage in a full *de novo* hearing * * * ")

(footnote omitted); *Stinson*, 97 F.3d at 469 ("If [de novo resentencing] were not the effect of our vacatur, we would have removed the illegal portion of the sentence and simply recalculated the sentence, instead of remanding to the district court for a time-consuming and expensive hearing.").

Of course, courts employing the de novo rule also have to determine if an opinion contains a limited mandate. But unlike courts employing the limited remand rule, courts operating under the de novo rule need only look for an "explicit limitation." *Campbell*, 168 F.3d at 268. "[T]o impose a limited remand, an appellate court must sufficiently outline the procedure the district court is to follow. The chain of intended events should be articulated with particularity. * * * The language used to limit the remand should be, in effect, unmistakable." *Id.* at 268.

Considerations of judicial economy, therefore, strongly favor rejection of the Second Circuit's position, and adoption of the rule that a district court resentencing a defendant after remand may sentence the defendant de novo when the appellate court has not specified limits on the scope of resentencing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2003

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 01-1013

UNITED STATES, Appellee,

- v. -

ERNESTO QUINTIERI, Defendant,

CARLO DONATO, Defendant-Appellant.

August Term, 2001

Submitted: February 11, 2002

Decided: October 09, 2002

Errata Filed: November 7, 2002

Before: WALKER, Chief Judge, SACK, and B.D. PARKER, JR., Circuit Judges.

Appeal from the judgment of the United States District Court for the Eastern District of New York (Jacob Mishler, *Judge*) resentencing the defendant, upon remand from this Court, to an aggregate term of 115 years' imprisonment and three years' supervised release following his conviction after a jury trial of one count of conspiracy to commit carjacking in violation of 18 U.S.C. § 371, six counts of carjacking in violation of 18 U.S.C. § 2119, and six counts of using a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c). The defendant was also ordered to pay a $175,000 fine and $295,807.25 in restitution. We hold that the defendant's fine exceeded the maximum fine

allowed for his offense level under the United States Sentencing Guidelines. The defendant's other challenges to his sentence are either without merit or barred by the law of the case.

Judgment affirmed in part; vacated as to sentence only and case remanded for the limited purpose of imposing an appropriate fine.

MICHAEL CORNACCHIA, Assistant United States Attorney (Alan Vinegrad, United States Attorney for the Eastern District of New York, Emily Berger, of counsel), Brooklyn, NY, for Appellee.

CARLO DONATO, pro se, Lompoc, CA; RUTH M. LIEBESMAN, New York, NY, for Defendant-Appellant.

SACK, Circuit Judge:

The defendant-appellant Carlo Donato was resentenced by the United States District Court for the Eastern District of New York (Jacob Mishler, *Judge*) upon remand after a decision of this court vacating his first sentence. Donato appeals on a variety of grounds. In order to decide this appeal, we must address knotty questions that emerge when an appeal results in a remand for resentencing. The difficulty arises largely from the apparent tension between the view, adverted to in *United States v. Atehortva*, 69 F.3d 679, 685 (2d Cir. 1995), *cert. denied sub nom. Correa v. United States*, 517 U.S. 1249 (1996), that resentencing should proceed *de novo* unless the remand "specifically limit[s] the scope of resentencing," and our conclusion in *United States v. Stanley*, 54 F.3d 103, 108 (2d Cir.), *cert. denied*, 516 U.S. 891 (1995), that resentencing is limited, not *de novo*, when the remanding court identifies a sentencing error and remands for correction

of that error but does not explicitly limit the scope of the remand. If the former view applies in the case before us, the district court was required to resentence Donato *de novo* and we must hear on appeal every issue raised at resentencing so long as we have not previously decided it. If the latter prevails, then the remand was limited and, under the doctrine of the law of the case, the district court should not have considered those issues, if any, that Donato previously waived or that we previously decided.

Donato appeals from the sentence imposed on him by the district court following our remand of the case for resentencing because it appeared that, at Donato's first sentencing, "double counting" may have improperly increased his offense level on one count. On remand, the district court concluded that it had indeed improperly increased Donato's offense level and, accordingly, reduced his sentence. The defendant argues on appeal: (1) through counsel, (a) that the district court was required to hold a hearing to determine whether he was competent to be resentenced, (b) that the district court was required to order a new presentence investigation report ("PSR") before resentencing him, (c) that the district court improperly failed to consider the required factors before ordering restitution and a fine, and (d) that the amount of the fine was in error; and (2) *pro se*, (a) that the district court improperly failed to consider his motion for a downward departure, and (b) that his sentence violates the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Eighth Amendment to the Constitution, and § 2K2.4 of the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines").

As the government concedes, the district court erred when it imposed a fine above the amount prescribed by the Guidelines without explaining its reasons for a departure. We conclude that all of Donato's other arguments are either barred by the law of the case or without merit.

BACKGROUND

In separate incidents in 1993 and 1994, Donato carjacked three Mercedes Benz and three BMW vehicles, each time threatening his victim with a gun. For these robberies, a jury convicted Donato in 1996 of one count of conspiracy to commit carjacking in violation of 18 U.S.C. § 371, six counts of carjacking in violation of 18 U.S.C. § 2119, and six counts of using a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). Based on a combined total offense level of thirty-two and a criminal history category of II, the district court sentenced Donato to 168 months' (fourteen years') imprisonment on the one count of conspiracy to commit carjacking and the six substantive carjacking counts.[1] Donato was also sentenced to 105 years on the firearm counts, five years for the first count and twenty years for each subsequent count pursuant to 18 U.S.C. §·924(c)(1), as then in effect, to be served consecutively to each other and to the carjacking sentence. The defendant's aggregate prison

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[1] Donato's combined total offense level for the one count of carjacking conspiracy and the six counts of carjacking was calculated pursuant to U.S.S.G. §§ 3D1.1(a) and 3D1.4, which provide for the calculation of a combined offense level by taking the offense level applicable to the count with the highest offense level and then adding levels to reflect the existence of multiple counts. The PSR determined that the conspiracy count had the highest offense level — twenty-seven. This level was calculated by enhancing the base offense level of twenty, U.S.S.G. §§ 2B3.1(a) and 2X1.1(a), by two levels because the conspiracy involved carjacking, § 2B3.1(b)(5), and then by five more levels because of possession of a firearm, § 2B3.1(b)(2)(C). A combined total offense level of thirty-two for all counts was then reached by adding five levels to account for Donato's more than five additional separate crimes, each with offense levels no more than four levels below that of the conspiracy offense. U.S.S.G. § 3D1.4. Because his criminal history category was II, the applicable Guideline range was 135 to 168 months.

term was therefore 119 years. He was also ordered to serve three years of supervised release[2] and to pay a $175,000 fine and $295,807.25 in restitution.

On April 23, 1997, we affirmed Donato's convictions in an unpublished order. *United States v. Donato*, 112 F.3d 506 (table), No. 96-1547, 1997 WL 196593, 1997 U.S. App. LEXIS 8094 (2d Cir. 1997) ("*Donato I*"). In March 1998, Donato brought a *pro se* motion to set aside his conviction and sentence pursuant to 28 U.S.C. § 2255. The district court denied this motion but granted a certificate of appealability. We appointed counsel, received briefing, and heard oral argument, most of it related to assertions of ineffective assistance of counsel on various grounds. *See Donato v. United States*, 208 F.3d 202 (table), No. 98-2991, 2000 WL 268593, 2000 U.S. App. LEXIS 3788 (2d Cir.) ("*Donato II*"), *cert. denied*, 531 U.S. 899 (2000). In an unpublished order dated March 7, 2000, we decided that all but one of Donato's arguments were without merit. *Id.* With respect to that one argument, we concluded that "there may have been improper double counting if the district court [had] increased the offense level for the conspiracy count" under U.S.S.G. § 2B3.1(b)(2)(C) for possession of a firearm and then also sentenced the defendant to a consecutive sentence under § 924(c) for the same firearm possession. *Id.* at *3, 2000 U.S. App. LEXIS 3788, at *7-*9. We therefore "remand[ed] to the district court for resentencing in light of [that] order, without prejudice to the government submitting an argument to the district court explaining why this was not double-counting." *Id.* at *3, 2000 U.S. App. LEXIS 3788, at *9.

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[2] Cognizant of the fact that Donato was unlikely to serve supervised release after completing his 119-year prison sentence, the district court nonetheless ordered a period of supervised release in anticipation of the possibility of a change in the law regarding deportation of incarcerated felons to which the imposition of supervised release might be relevant.

On remand, after consultation with the probation department, the government conceded that Donato's combined total offense level on the conspiracy count had been improperly enhanced as a result of "double counting." The government told the court that Donato's combined total offense level on the conspiracy count and the carjacking counts should therefore have been twenty-nine, not thirty-two. Donato's combined total offense level for these counts would then have to have been recalculated pursuant to the grouping provisions contained in U.S.S.G. §§ 3D1.1(a) and 3D1.4, which provide for the calculation of a combined offense level by taking the offense level applicable to the count with the highest offense level and then adding levels to account for the fact that multiple counts are involved. At the original sentencing, according to the PSR, the conspiracy count had the highest offense level. But after removing the improper enhancement for possession of a firearm, that was no longer the case. One of the substantive counts for carjacking now had the highest offense level — twenty-four. This level was calculated by enhancing the base offense level of twenty, U.S.S.G. § 2B3.1(a), by two levels because the robbery involved carjacking, § 2B3.1(b)(5), and then by two more levels because the loss amount was more than $50,000, § 2B3.1(b)(7)(C). The government then arrived at a combined total offense level of twenty-nine for all seven convictions by adding five additional levels to account for Donato's additional six crimes with offense levels within four levels of the carjacking count with the highest offense level. *See* U.S.S.G. § 3D1.4(a).[3] Because Donato's criminal history category was II, the appli-

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[3] For purposes of § 3D1.4(a), the defendant committed six not seven separate crimes because his conviction on the conspiracy count was grouped with his conviction on one of the substantive counts of carjacking. *See* U.S.S.G. § 3D1.2(b), cmt. n.4. Under § D1.4(a), the six crimes required the court to assess six "units," which, under that section, in turn called for the five-level enhancement.

cable Guideline range for the conspiracy and carjacking counts was now 97 to 121 months. As before, this sentence would run consecutively to the 105-year prison term on the firearm counts.[4]

At the resentencing hearing on December 1, 2000, defense counsel "concurred" in the government's sentencing analysis but asked the court to downwardly depart for post-conviction rehabilitation. Defense counsel also asked the court to consider Donato's *pro se* sentencing memorandum that argued that his sentence violates the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court denied the application for a downward departure and rejected Donato's *Apprendi* arguments.

When asked if he wished to make a statement, Donato said that he felt "dizzy" and was not well enough to be at the hearing because his psychiatric medications had been "mix[ed] up" the previous day. Hr'g Tr. of Dec. 1, 2000, at 4. Defense counsel stated that based on three conversations with Donato the previous day and a review of his medical records, she thought that while he did not "feel[ ] well" he was nonetheless "lucid and able to continue with the sentencing." *Id.* at 5. Defense counsel also reported that Donato "[was] well oriented as to time and place and fully underst[ood] the purpose of [the] procedure." *Id.* No one pre-

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[4] Pursuant to U.S.S.G. § 2K2.4(a)(2), Donato was sentenced originally and at the resentencing to the minimum term of imprisonment required by 18 U.S.C. § 924(c). At the time he committed the firearm offenses, § 924(c) provided for a mandatory minimum sentence of five years for the first conviction and a mandatory minimum sentence of twenty years for each subsequent conviction. Donato was therefore sentenced to five years on the first firearm count and twenty years on each of the five other firearm counts. In accordance with U.S.S.G. § 5G1.2(a), these sentences all run consecutively to each other and to the carjacking sentence.

sent at the resentencing hearing requested a competency hearing.

The district court then resentenced Donato to the same term as it had the first time, except that to correct for the "double counting," the court reduced Donato's sentence on the conspiracy and carjacking counts to 120 months (ten years) — one month shy of the top of the sentencing range. He therefore received an aggregate prison sentence of 115 years — ten years for conspiracy and carjacking plus 105 years for the firearm offenses. Additionally, the court sentenced him to three years' supervised release, a $175,000 fine, and $295,807.25 in restitution.

This appeal followed.

DISCUSSION

I. The Issues Properly Before Us

As noted, the issues Donato raises on appeal are: (1) through counsel, (a) whether the district court was required to hold a hearing to determine whether he was competent to be resentenced, (b) whether the district court was required to order a new PSR before resentencing him, (c) whether the district court improperly failed to consider the required factors before ordering restitution and a fine, and (d) whether the amount of the fine was in error; and (2) *pro se*, (a) whether the district court improperly failed to consider his motion for a downward departure, and (b) whether his sentence violates the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Eighth Amendment to the Constitution, or U.S.S.G. § 2K2.4. The threshold question is which of these arguments, if any, are properly before us and not barred by the law of the case doctrine.

The law of the case doctrine has two branches. The first requires a trial court to follow an appellate court's previous ruling on an issue in the same case. *United States v. Uccio*, 940 F.2d 753, 757 (2d Cir. 1991) (citing *United States v.*

Cirami, 563 F.2d 26, 32 (2d Cir. 1977)). This is the so-called "mandate rule."[5] *United States v. Tenzer*, 213 F.3d 34, 39-40 (2d Cir. 2000). The second and more flexible branch is implicated when a court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issue by a higher court. It holds "that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case," *Uccio*, 940 F.3d at 758, unless "cogent" and "compelling" reasons militate otherwise, *Tenzer*, 213 F.3d at 39.

The "mandate rule" ordinarily forecloses relitigation of all issues previously waived by the defendant or decided by the appellate court. But when a case is remanded for *de novo* resentencing, the defendant may raise in the district court and, if properly preserved there, on appeal to the court of appeals, issues that he or she had previously waived by failing to raise them. See *United States v. Stanley*, 54 F.3d 103, 107 (2d Cir.) ("*Stanley II*"), *cert. denied*, 516 U.S. 891 (1995).

Donato seeks to raise some issues that he waived by not raising them during his initial sentencing proceedings or on his previous appeal. We must therefore determine at the outset whether Donato's case was remanded for *de novo* or for limited resentencing. We conclude that in this case, because we identified a particular sentencing issue necessitating remand — whether Donato's total offense level on the conspiracy count was improperly enhanced as a result of "double counting" — the remand was limited, not *de novo*. Because the remand was limited, Donato may not now raise arguments that he had an incentive and an opportunity to raise previously but did not raise, absent a cogent and compelling reason for permitting him to do so.

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[5] Technically, the "mandate" of this Court consists of a "certified copy of [our] judgment, a copy of the opinion, and any direction as to costs." *United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995).

A. Whether Donato's Resentencing Was De Novo

When Donato's case was last before us, we remanded it to the district court for resentencing because we had identified a possible sentencing error — "double counting." *Donato II*, 2000 WL 268593, at *3, 2000 U.S. App. LEXIS 3788, at *8-*9. Specifically, we stated:

> [T]here may have been improper double counting if the district court increased the offense level for the conspiracy count because of the firearm possession charged as an overt act in Count One, and then sentenced Donato to a five-year consecutive sentence under section 924(c) for the use and possession of a firearm during the commission of the carjacking charged in Count Two. *We therefore remand to the district court for resentencing in light of this order*, without prejudice to the government submitting an argument to the district court explaining why this was not double-counting.
>
> *We have considered Donato's other claims and find them to be without merit.*
>
> The judgment of the district court is hereby AFFIRMED in part and REMANDED in part.

Id. (emphasis added). This remand order neither explicitly stated that the sole issue on remand was whether "double counting" affected Donato's sentence on the conspiracy count, nor indicated that we intended a *de novo* resentencing or were leaving any issues open for the district court's further consideration other than whether "double counting" improperly affected Donato's total offense level. In *Stanley II*, we held that a similar mandate did not allow for *de novo* resentencing. 54 F.3d at 108. On a preceding appeal in that case, *United States v. Stanley*, 12 F.3d 17 (2d Cir. 1993) ("*Stanley I*"), *cert. denied*, 511 U.S. 1044 (1994), we had remanded for resentencing because the district court had failed to make

sufficient factual findings to support its loss calculation and thereby may have improperly increased the offense level. *Id.* at 21. In explaining our mandate, we said:

> In sum, *because* the district court failed to indicate whether its loss calculation was based on actual or intended loss, and failed to make sufficient factual findings supporting either calculation, *we remand for resentencing*. If upon reconsideration, the district court's sentencing calculation results in a determination of loss different from that originally found, the district court may wish to also recalculate the amount of restitution and make findings as to that issue. *We have examined Stanley's remaining contentions regarding his sentence and find them to be without merit.*
>
> CONCLUSION
>
> Based on the foregoing, we affirm defendant's conviction, but *vacate and remand this case for further sentencing proceedings consistent with this opinion.*

Id. (emphasis added). On appeal after remand and resentencing, we read our original mandate as effecting a limited remand on the sole issue of whether the loss amount was properly calculated. We concluded that the mandate of the *Stanley I* panel "did not call for *de novo* resentencing. Instead, we identified a narrow issue for remand . . . ." *Stanley II*, 54 F.3d at 108. We therefore held that the defendant was barred by the law of the case's "mandate rule" from challenging a two-level upward adjustment to his offense level for more than minimal planning and multiple victims that had been imposed at his original sentencing, because the defendant had failed to challenge these adjustments in his first appeal. *Id.* at 107-08. To support this conclusion, we cited *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993), for the proposition that "where [an] appellate court vacates a sentence and remands for consideration of a specific issue,

[the] mandate rule prevents [the] district court from hearing an issue not raised on the initial appeal." *Stanley II*, 54 F.3d at 107 (citing *Bell*, 988 F.2d at 250).Our remand order in *Donato II* does not differ in any material respect from the remand order in *Stanley I*. Both identified a specific sentencing error, remanded because of that error, and decided that all other claims were without merit. We therefore conclude that the remand in *Donato II* was not for *de novo* resentencing and that accordingly Donato may not now raise arguments that he waived by not making them on his previous appeal. This holding is consistent with our repeated statement that to determine whether a remand is *de novo*, we must "look to both the specific dictates of the remand order as well as the broader 'spirit of the mandate.'" *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (citation omitted); *accord United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002). To allow for *de novo* sentencing in cases like *Stanley I* and *Donato II* would contradict the "spirit of the mandate" — directing the district court to correct an error or possible error that we had identified in the sentencing — even if the mandate does not expressly state that the resentencing will be limited.

At first glance, a decision of ours handed down several months after *Stanley II*, *United States v. Atehortva*, 69 F.3d 679 (2d Cir. 1995) ("*Atehortva*"), *cert. denied sub nom. Correa v. United States*, 517 U.S. 1249 (1996), seems to cast some doubt on that conclusion. The defendant-appellant in *Atehortva* had been convicted on three separate counts, two of which were vacated on a first appeal. *United States v. Atehortva*, 17 F.3d 546, 552 (2d Cir. 1994). We simply "remanded . . . for sentencing," explaining only that "we [did not] need [to] address the sentencing issues . . . since the case [had to be] remanded to the district court for resentencing." *Id.* On remand, the district court upwardly departed from the Guideline range even though it had not upwardly departed during the original sentencing. *Atehortva*, 69 F.3d at 683. We upheld this upward departure, concluding that:

> [B]ecause the resentencing was based on a different set of circumstances, the court was free to consider grounds for departure it had not contemplated in the first sentencing proceeding. That is, the resentencing proceeding was appropriately treated as a *de novo* sentencing, for the remand did not specifically limit the scope of resentencing.

Id. at 685. This seems to suggest that sentencing must proceed *de novo* unless a court "specifically limit[s] the scope of resentencing." But *Atehortva's* holding is properly limited to cases where one or more convictions have been vacated and we have remanded for resentencing on the remaining counts. In *Atehortva*, we explained:

> When a defendant challenges *convictions on particular counts* that are inextricably tied to other counts in determining the sentencing range under the guidelines, the defendant assumes the risk of undoing the intricate knot of calculations should he succeed. Once this knot is undone, the district court must sentence the defendant *de novo* . . . .

Id. at 685-86 (citation omitted; emphasis added). A district court's sentence is based on the constellation of offenses for which the defendant was convicted and their relationship to a mosaic of facts, including the circumstances of the crimes, their relationship to one another, and other relevant behavior of the defendant. When the conviction on one or more charges is overturned on appeal and the case is remanded for resentencing, the constellation of offenses of conviction has been changed and the factual mosaic related to those offenses that the district court must consult to determine the appropriate sentence is likely altered. For the district court to sentence the defendant accurately and appropriately, it must confront the offenses of conviction and facts anew. The offenses and facts as they were related at the first sentence may, by then, have little remaining significance. The "spirit

of the mandate" in such circumstances is therefore likely to require *de novo* resentencing. *See Bryce*, 287 F.3d at 252-54 (holding that resentencing properly proceeded *de novo* after one of two convictions was vacated and the district court was presented with important evidence that was not previously available); *United States v. Morales*, 185 F.3d 74, 85 (2d Cir. 1999) (citing Atehortva and requiring *de novo* resentencing "[b]ecause the sentences imposed on the reversed and remaining counts are or may be interdependent"), *cert. denied*, 529 U.S. 1010 (2000). In contrast, resentencing to correct specific sentencing errors does not ordinarily undo the entire "knot of calculation."

That resentencing usually should be *de novo* when a Court of Appeals reverses one or more *convictions* and remands for resentencing, then, does not deviate from the rule applied in *Stanley II* that absent explicit language in the mandate to the contrary, resentencing should be limited when the Court of Appeals upholds the underlying convictions but determines that a *sentence* has been erroneously imposed and remands to correct that error. To be sure, there may be circumstances when we reverse a sentence in which the "spirit of the mandate" requires *de novo* sentencing, for example when the reversal effectively undoes the entire "knot of calculation," but this is not such a case.[6]

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[6] The circuits are divided as to whether a remand for resentencing should be limited or *de novo* absent explicit direction from the remanding court. The Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits follow a *de novo* sentencing default rule. *See United States v. Jennings*, 83 F.3d 145, 151 (6th Cir.) (creating a default rule of *de novo* resentencing), *amended by* 96 F.3d 799 (6th Cir.), *cert. denied sub nom. Stepp v. United States*, 519 U.S. 975 (1996); *United States v. Cornelius*, 968 F.2d 703, 705-06 (8th Cir. 1992) (same); *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995) (same); *United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir.) (same), *cert. denied*, 502 U.S. 879 (1991); *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) ("Under [a] holistic approach,

B. The Implications of a Limited Remand

Applying these principles, the remand in this case was limited to the issue of "double counting." The law of the case doctrine therefore dictates what issues may be raised in the district court and on any subsequent appeal. *See Stanley*

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when a criminal sentence is vacated, it becomes void in its entirety; the sentence — including any enhancements — has been wholly nullified and the slate wiped clean. Consequently, . . . the district court is free to reconstruct the sentence utilizing any of the sentence components." (citations and internal quotation marks omitted)), *cert. denied*, 519 U.S. 1137 (1997).

The D.C., First, Fifth, and Seventh Circuits follow a default rule of limited resentencing. *See United States v. Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997) ("[U]pon a resentencing occasioned by a remand, unless the court of appeals expressly directs otherwise, the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision — whether by the reasoning or by the result."), *cert. denied*, 522 U.S. 1119 (1998); *United States v. Ticchiarelli*, 171 F.3d 24, 32 (1st Cir.) (same), *cert. denied sub nom. Bowen v. United States*, 528 U.S. 850 (1999); *United States v. Marmolejo*, 139 F.3d 528, 530-31 (5th Cir.) (same), *cert. denied*, 525 U.S. 1056 (1998); *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) (same), *cert. denied*, 522 U.S. 1119 (1998).

Today we conclude that when a resentencing results from a vacatur of a conviction, we in effect adhere to the *de novo* default rule of the Sixth, Eighth, Ninth, and Eleventh Circuit, because multiple convictions are "inextricably linked" in calculating the sentencing range under the guidelines. *Atehortva*, 69 F.3d at 685-86; *see also Bryce*, 287 F.3d at 253-54; *Morales*, 185 F.3d at 85. But when a resentencing is necessitated by one or more specific sentencing errors, unless correction of those errors would undo the sentencing calculation as a whole or the "spirit of the mandate" otherwise requires *de novo* resentencing, we in effect adhere to the First, Fifth, Seventh, and D.C. Circuit's default rule of limited resentencing. *See Stanley II*, 54 F.3d at 107-08.

II, 54 F.3d at 107. The law of the case ordinarily "forecloses relitigation of issues expressly or impliedly decided by the appellate court." *Ben Zvi*, 242 F.3d at 95 (citations, internal quotation marks, and emphasis omitted). And "where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone," it is considered waived and the law of the case doctrine bars the district court on remand and an appellate court in a subsequent appeal from reopening such issues "unless the mandate can reasonably be understood as permitting it to do so."[7] *Id.* (citations omitted). We have explained that "'it would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.'" *Id.* at 96 (quoting *County of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997)). For similar reasons, we conclude that the law of the case ordinarily prohibits a party, upon resentencing or an appeal from that resentencing, from raising issues that he or she waived by not litigating them at the time of the initial sentencing.

An issue is not considered waived, however, if a party did not, at the time of the purported waiver, have both an opportunity and an incentive to raise it before the sentencing court

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[7] Of course, an issue cannot be waived by failure to raise it on appeal unless it could have been raised on that appeal. For example, a district court's refusal to grant a discretionary downward departure is not appealable unless there is evidence in the record that the district court did not recognize its authority to depart downwardly. *United States v. Schmick*, 21 F.3d 11, 13 (2d Cir. 1994) (per curiam). Thus, it would be unfair to hold that defendants waived their opportunity to request a downward departure at resentencing by not raising the issue on their first appeal. But if the defendant chose not to request a downward departure when first sentenced, he or she waived the right to request such a departure at a subsequent sentencing based on any grounds available at the first sentencing.

or on appeal. *See United States v. Ticchiarelli*, 171 F.3d 24, 32-33 (1st Cir.) ("Whether there is a waiver depends not . . . on counting the number of missed opportunities . . . to raise an issue, but on whether the party had sufficient incentive to raise the issue in the prior proceedings." (citation omitted)), *cert. denied sub nom. Bowen v. United States*, 528 U.S. 850 (1999); *United States v. Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997) ("A defendant should not be held to have waived an issue if he did not have a reason to raise it at his original sentencing . . . ."), *cert. denied*, 522 U.S. 1119 (1998). Thus, if a sentencing determination had no practical effect on a defendant's sentence at the original sentencing but becomes relevant only after appellate review, a defendant is free to challenge that sentencing determination on remand, and ultimately on reappeal, despite the failure to challenge that determination initially. *See id.* at 960 (holding that the district court may consider issues "made newly relevant by the court of appeals' decision — whether by the reasoning or by the result"); *Ticchiarelli*, 171 F.3d at 32 (same, citing *Whren*); *see also Atehortva*, 69 F.3d at 685 (noting that a failure to make an argument at the original sentencing cannot be viewed as a waiver if that argument would have then been "purely academic"). To deprive defendants of this ability, "would unnecessarily increase the burden on district courts and this court" because "defendants would be forced to litigate every aspect of the sentencing report in the original hearing, even though irrelevant to the immediate sentencing determination in anticipation of the possibility that, upon remand, the issue might be relevant." *United States v. Jennings*, 83 F.3d 145, 151 (6th Cir.), *amended by* 96 F.3d 799 (6th Cir.), *cert. denied sub nom. Stepp v. United States*, 519 U.S. 975 (1996).

Furthermore, and importantly, even when a remand is limited, an issue may be raised if it arises as a result of events that occur after the original sentence. *See United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (per curiam) (hold-

ing that even when the remanding opinion ordered resentencing at a specific offense level, the district court could depart from this level if there were "intervening circumstances"); *see also Werber v. United States*, 149 F.3d 172, 178 (2d Cir. 1998) (holding that the district court at resentencing must take into account changed circumstances). If, for example, a woman whose spouse cared for their young children is convicted of a crime, she might see little point in seeking a downward departure pursuant to § 5K2.0 of the Guidelines on the basis of extraordinary family circumstances. If, between her first and second sentencing, her spouse were to die unexpectedly, however, we do not doubt that she could raise the issue of extraordinary family circumstances in a second sentencing following remand even though the remand was "limited" to a different issue. *See Bryson*, 229 F.3d at 426 (stating that extraordinary rehabilitation between the first and second sentencing cannot be ruled out as a possible ground for a downward departure during the second). This to some extent reflects the general admonition that "a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing." *Id.* (citation omitted).

Finally, even if an issue is barred by the law of the case, appellate courts may depart from the law of the case and reconsider the issue for "cogent" and "compelling" reasons such as "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000) (citation and internal quotation marks omitted); *accord United States v. Minicone*, 994 F.2d 86, 89 (2d Cir. 1993); *United States v. Lanese*, 937 F.2d 54, 57 (2d Cir. 1991) (per curiam) (departing from the law of the case because of an intervening change in the controlling law). And despite the second branch of the law of the case doctrine, which holds that "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case," *United States v. Uccio*,

940 F.2d 753, 758 (2d Cir. 1991) (citation omitted), district courts may similarly depart from the law of the case and reconsider their own decisions for cogent and compelling reasons if those decisions have not been ruled on by the appellate court. *DiLaura v. Power Auth.*, 982 F.2d 73, 77 (2d Cir. 1992) (citing *Doe v. N.Y. City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir.), *cert. denied sub nom. Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983)); *see also Minicone*, 994 F.2d at 89 ("[T]he trial court is 'barred from reconsidering or modifying any of its prior decisions that have been ruled on by the court of appeals.'" (quoting *Uccio*, 940 F.2d at 757)).[8]

C. Application of the Law of the Case to Donato's Limited Mandate

Several of the arguments Donato raises on appeal are barred by the law of the case.

Donato's argument that the district court failed to consider the required factors before imposing restitution and a fine is barred by the law of the case. To the extent that Donato challenges the procedure followed at the original sentencing, this argument is foreclosed because he had an

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[8] Our discussion of which issues may be raised applies only to the resentencing proceeding (whether the resentencing results from a remand after direct appeal or from a successful § 2255 motion) in the district court and a subsequent direct appeal. Different concerns may govern whether a § 2255 motion following a resentencing is to be treated as a first or successive habeas petition. *See Galtieri v. United States*, 128 F.3d 33, 37-38 (2d Cir. 1997) ("[W]henever a first 2255 petition succeeds in having a sentence amended, a subsequent 2255 petition will be regarded as a 'first' petition only to the extent that it seeks to vacate the new, amended component of the sentence, and will be regarded as a 'second' petition to the extent that it challenges the underlying conviction or seeks to vacate any component of the original sentence that was not amended."); *Esposito v. United States*, 135 F.3d 111, 113 (2d Cir. 1997) (per curiam) (same).

incentive and an opportunity to challenge these procedures during his previous appeal but did not do so. And because the remand for resentencing was limited, the district court was barred from reconsidering the propriety of imposing restitution and a fine. Thus, the district court did not err at the resentencing by reimposing restitution and a fine without first reconsidering on the record the required factors.

Donato's assertions that his sentence violates the Eighth Amendment and the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) are also barred by the law of the case and we see no compelling reason to consider these issues now. We need not decide whether *Apprendi*, which was decided after Donato's previous appeal, constitutes a significant enough change in the controlling law to allow us to depart from the law of the case because Donato's *Apprendi* arguments are utterly without merit. The jury found all the elements of the crimes for which Donato was convicted, his sentences do not exceed the statutory maximum for any of those crimes, and the jury was not required to find sentencing facts that only affected his Guideline range. *See United States v. Garcia*, 240 F.3d 180, 184 (2d Cir.) (holding that "a guideline factor, unrelated to a sentence above a statutory maximum or to a mandatory statutory minimum, may be determined by a sentencing judge and need not be submitted to a jury" (citations omitted)), *cert. denied*, 533 U.S. 960 (2001).

Finally, Donato's assertion that the district court violated U.S.S.G. § 2K2.4 by increasing his offense level on the carjacking and conspiracy counts to account for "special offense characteristics" is not properly before us because Donato did not make that assertion on his previous appeal even though the offense level on each of the carjacking and conspiracy counts had an impact on his sentence then. While at the original sentencing his combined total offense level for those counts was determined primarily based on his offense level for the conspiracy count, his offense level on the carjacking

counts affected his combined total offense level.[9] *See* U.S.S.G. § 3D1.4. Thus, having had both opportunity and incentive to mount this challenge the first time around and having failed to do so, Donato cannot do so now.

Four of Donato's arguments are not barred by the law of the case, however. Two of them — whether the district court should have held a hearing to determine whether Donato was mentally competent at the resentencing and whether the district court should have ordered a new PSR before resentencing him — arise from events that occurred after the last appeal and therefore are not barred. And to the extent that Donato argues that he should receive a downward departure for rehabilitation that occurred subsequent to his initial sentencing, this argument is similarly not barred because it is based on "intervening circumstances." *Bryson*, 229 F.3d at 426. To the extent Donato is arguing that he should receive a downward departure based on circumstances that existed at the time of the initial sentencing, these arguments are barred by the law of the case because he had an incentive and opportunity to request a downward departure at the original sentencing.

We also conclude that Donato's argument that the *amount* of the fine is in error is not barred by the law of the case. Pursuant to U.S.S.G. § 5E1.2, Donato's fine is determined based on his offense level. Because of the "double

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[9] U.S.S.G. § 3D1.4(a) provides for the increase of the combined offense level by one point for each count with an offense level "equally serious [to] or from 1 to 4 levels less serious" than the count with the highest offense level. But the combined offense level is only increased by one-half a level if the offense level is "5 to 8 levels less serious than the Group with the highest offense level." § 3D1.4(b). If Donato had successfully challenged the enhancements for "specific offense characteristics" at the original sentencing, each carjacking count would have increased the combined offense level by one-half instead of one offense level.

counting" — the correction of which was the purpose of the remand — Donato's offense level and consequently his fine was too high at the first sentencing. We think that correcting the amount of the fine, after correcting the offense level on which it was based, was well within the limitation placed on the remand.

We will therefore now consider the four arguments properly before us.

II. Procedural Competency

A. Legal Standard

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992) (citations omitted); *see also Godinez v. Moran*, 509 U.S. 389, 403 (1993) (Kennedy, J., concurring) ("the due process clause does not mandate different standards of competency at various stages of or for different decisions made during the criminal proceedings"). To protect this right, 18 U.S.C. § 4241(a) requires the district court to order a hearing *sua sponte* to determine the mental competence of a defendant "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." § 4241(a); *see also United States v. Auen*, 846 F.2d 872, 877 (2d Cir. 1988); *United States v. Vamos*, 797 F.2d 1146, 1150 (2d Cir. 1986). A district court's determination that "reasonable cause" to hold a competency hearing is absent is reviewed only for abuse of discretion. *Auen*, 846 F.2d at 877; *Vamos*, 797 F.2d at 1150.

"There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed . . . ." *Drope v. Missouri*, 420 U.S. 162,

180 (1975). A district court must consider many factors when determining whether it has "reasonable cause" to order a competency hearing. *Id.* The district court's own observations of the defendant's demeanor during the proceeding are relevant to the court's determination, but the court's observations alone "cannot be relied upon to dispense with a hearing on that very issue" if there is substantial other evidence that the defendant is incompetent. *Pate v. Robinson*, 383 U.S. 375, 386 (1966); *see also Vamos*, 797 F.2d at 1150 ("[D]eference is owed to the district court's determinations based on observation of the defendant during the proceedings."). And while a defendant may be found incompetent even when his attorney asserts that he is competent, *United States v. Hemsi*, 901 F.2d 293, 294-96 (2d Cir. 1990), "[a] failure by trial counsel to indicate that the defendant had any difficulty assisting in preparation or in comprehending the nature of the proceedings 'provides substantial evidence of the defendant's competence.'" *United States v. Kirsh*, 54 F.3d 1062, 1071 (2d Cir.) (quoting *Vamos*, 797 F.2d at 1150)), *cert. denied*, 516 U.S. 927 (1995); *see also Drope*, 420 U.S. at 177 n. 13 (recognizing the importance of considering counsel's judgment about the defendant's state of mind). A district court also often orders and reviews psychiatric records when determining whether to hold a hearing. *See, e.g., Vamos*, 797 F.2d at 1150-51.

B. Analysis

Donato, through counsel, contends that the district court should have held a hearing to determine his competence after he complained that he felt dizzy because prison officials administered the wrong psychiatric medication. Certainly, the improper administration of psychiatric medicine can render an individual temporarily incompetent. *Riggins v. Nevada*, 504 U.S. 127, 137 (1992); *id.* at 143-44 (Kennedy, J., concurring) ("[S]erious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The preju-

dice can be acute during the sentencing phase of the proceedings . . . ."); *McGregor v. Gibson*, 248 F.3d 946, 956-58 (10th Cir. 2001) (in banc) (finding the defendant incompetent in part because he had received improper medication for his psychiatric condition). Although adjourning the sentencing until Donato was feeling better might have been advisable, we do not think that the district court abused its discretion by concluding that it had no "reasonable cause" to believe that a competency hearing was necessary.

The district court was able to observe Donato's demeanor and had the benefit of hearing directly his brief statement at sentencing. Additionally, Donato's attorney stated that she had spoken with him three times the previous day, after the mismedication, and that while he appeared to be suffering unfortunate effects from the medicine, he was lucid and able to understand the proceedings. These assurances, combined with the court's own observations, overcome any reasonable doubt as to the defendant's competence that may have been raised by his statement that he felt dizzy.[10]

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[10] In cases where appellate courts have reversed because of a trial court's failure to order a competency hearing, the evidence of incompetency was significantly stronger. *Compare Drope*, 420 U.S. at 164-67, 177-82 (further inquiry needed when the defendant tried to kill his wife on the eve of trial and attempted suicide during trial, his counsel said he was insane, a doctor's report questioned his sanity, and he had a history of irrational behavior); *Pate*, 383 U.S. at 385-86 (holding that despite the defendant's good behavior during trial, the court should have held a competency hearing when presented with "uncontradicted testimony of [the defendant's] history of pronounced irrational behavior"); *Auen*, 846 F.2d at 878 (holding that a hearing should have been held because the defendant "set forth his various irrational, paranoid beliefs," rambled in court, and exhibited bizarre behavior); *Johnson v. Norton*, 249 F.3d 20, 22-24, 27-28 (1st Cir. 2001) (reversing for failure to hold a competency hearing when the defendant passed out three times on the day of trial after being hit on the head, the defendant com-

III. Presentence Investigation Report

Donato, through counsel, next argues that the district court violated Fed. R. Crim. P. 32(b) by resentencing him without an updated PSR. Because Donato did not object to the use of the original PSR at the time of resentencing, we review its use for plain error. *See United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001) (in banc) (setting out the four-part test for plain error). We conclude that the district court did not commit error, much less plain error, by relying on the original PSR at resentencing.

Rule 32(b) provides:

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plained that he did not know what was going on, and trial counsel indicated that he was unable to communicate with the defendant); *McGregor*, 248 F.3d at 955 (holding that a competency hearing was required "in light of the inconsistent evidence concerning whether [the defendant] was properly medicated throughout trial, counsel's repeated and vehement contentions that his client was unable to assist in his own defense, [the defendant's] odd behavior at trial and, of course, [the defendant's] substantial history of mental illness"), *with Kirsh*, 54 F.3d at 1070-71 (holding that no hearing was necessary even though the defendant's first counsel questioned the defendant's competence because the defendant and his second counsel claimed he was competent, psychiatric reports indicated that he was competent, and he behaved normally at trial); *Vamos*, 797 F.2d at 1149-51 (holding that a competency hearing was not required prior to trial because counsel did not request one and the defendant was active during the trial, even though the guilty plea was vacated several months previously after defense counsel and a doctor said the defendant was incompetent); *Chichakly v. United States*, 926 F.2d 624, 631-32 (7th Cir. 1991) (holding that despite the defendant's allegations that he was incompetent due to psychiatric medications, "[t]here is certainly no need to conduct a competency hearing when there is no evidence before the Court of incompetency and when the defense attorney failed to request one and neither the prosecuting attorney nor the judge saw a need for one").

> **Presentence Investigation and Report**
>
> **(1) When Made.** The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless:
>
> (A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and
>
> (B) the court explains this finding on the record.

We have held that Rule 32 does not require "'an updated PSR in the event of *resentencing*'" if, for example, "the parties are given a full opportunity to be heard and to supplement the PSR as needed . . . ." *United States v. Triestman*, 178 F.3d 624, 633 (2d Cir. 1999) (emphasis in original; quoting *United States v. Conhaim*, 160 F.3d 893, 896 (2d Cir. 1998)).

Donato was provided a full opportunity to supplement the original PSR, and the need for an updated PSR was not readily apparent. The government, the probation department, and Donato all agreed on the resolution of the "double counting" issue. The defendant submitted a detailed letter updating the court on his conduct while incarcerated. And the court provided the defendant, as well as his counsel, an opportunity to speak at the resentencing hearing. In retrospect, an updated PSR might have been useful because the probation department might have noticed, as we explain below, that the fine was miscalculated. But because the defendant did not object to the amount of the fine, we cannot fault the district court for failing to order a new PSR to address that issue.

IV. Downward Departure

Donato's *pro se* argument that the district court failed to consider his motion for a downward departure based on post-sentencing rehabilitation is without merit. The court considered and rejected this motion on its merits. Parenthetically,

the court was plainly correct in denying it. Donato and the government agree that the Guidelines effective November 1, 2000 apply to the resentencing, and U.S.S.G. § 5K2.19 of the Guidelines as of that date prohibits a downward departure based on post-sentencing rehabilitative efforts.

V. The Amount of the Fine

The government concedes that the amount of the fine is in error. On remand for resentencing, the parties agreed that Donato's previously determined offense level of thirty-two was improper due to "double counting" and that his total offense level is twenty-nine. Pursuant to U.S.S.G. § 5E1.2(c)(3), a defendant with a total offense level of twenty-nine is subject to a fine between $15,000 and $150,000. The court, however, reimposed the original fine of $175,000, which is an appropriate fine under the Guidelines only for offense levels of thirty-two or greater. See U.S.S.G. § 5E1.2(c)(3). Because the district court imposed a fine above the Guideline range without explaining its reason for the departure, the $175,000 fine was clearly imposed in error. See 18 U.S.C. § 3353(c)(2) (stating that the court must, at time of sentencing, provide explanation for departure from guidelines range). Even though Donato did not object to the amount of the fine in the district court, a limited remand for the purpose of redetermining the amount of the fine is necessary because the error was plain, it affects Donato's substantial rights, and failing to correct the error would seriously affect the fairness of the judicial proceedings. *See Thomas*, 274 F.3d at 667.

CONCLUSION

For the foregoing reasons, we affirm in part, but vacate the imposition of the fine and remand to the district court for the limited purpose of imposing a fine within the appropriate Guideline range, or imposing a fine above the Guideline range with appropriate explanation.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 98-2991

CARLO DONATO, Petitioner-Appellant,

- v. -

UNITED STATES, Respondent-Appellee.

March 7, 2000

Appeal from the United States District Court for the Eastern District of New York, Mishler, J.

Ellen B. Resnick, Law Offices of Alan S. Futerfas, New York, NY, for appellant.

Michael Cornacchia, Assistant United States Attorney; Loretta E. Lynch, United States Attorney, Eastern District of New York, Emily Berger, Assistant United States Attorney, on the brief, Brooklyn, NY, for appellee.

Present WALKER, PARKER, and SOTOMAYOR, Circuit Judges.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED in part and REMANDED in part.

Petitioner-appellant Carlo Donato appeals from the district court's July 8, 1998 judgment denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255.

Donato was convicted in 1996, after a jury trial, of conspiracy to commit carjacking and six counts of carjacking in violation of 18 U.S.C. § 2119, and six counts of use of a firearm in each of the carjackings in violation of 18 U.S.C. § 924(c). The court sentenced him principally to 119 years imprisonment, a $175,000 fine and $295,807 restitution. The conviction was affirmed on April 23, 1997. *United States v. Donato*, 112 F.3d 506 (2d Cir. 1997).

On March 28, 1998, Donato brought a *pro se* petition for habeas corpus, claiming that his counsel was ineffective because he (a) did not allow Donato to testify at trial, (b) could not communicate effectively with Donato because the court did not appoint an interpreter, (c) labored under a conflict of interest because he had applied for a position with the Florida attorney general, (d) did not review the presentence report, and (e) failed to challenge on direct appeal Donato's convictions on the firearms counts in light of *Bailey v. United States*, 516 U.S. 137 (1995). The district court denied the petition in its entirety, finding that (1) the decision not to testify was Donato's, not counsel's, (2) Donato had a good command of English, and (3) the claim of conflict of interest was without merit.

On appeal, Donato raises the following claims: (1) through counsel, he alleges (a) that he was deprived of the right to testify at trial, and (b) that the district court erred in failing to conduct an inquiry into counsel's alleged conflict of interest, and (2) *pro se* he argues: (a) that the district court erred in dismissing his petition, (b) that counsel was ineffective for failing to object to the jury instructions on the elements of certain of the crimes, (c) that the jury instructions violated his right to have the jury determine each element of the crime, (d) that counsel failed to review the presentence

report with him before sentencing, and (e) that the district court erred in calculating his sentence.

Donato's claim that counsel rendered ineffective assistance by preventing him from testifying at trial must meet the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must therefore show that counsel's performance was so deficient as to deprive him of a fair trial, and that the result would have been different but for counsel's errors. *See Brown v. Artuz*, 124 F.3d 73, 79-80 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1077 (1998).

Donato claims that his lawyer, Michael B. Cohen, told him that he was not going to let him testify at trial. The district court directed Cohen to respond to this claim in writing, and Cohen stated to the court, "I never at any time told Mr. Donato that I would not permit him to testify on his own behalf. In fact my recollection is that during trial when I discussed this matter with Mr. Donato he informed me that he did not wish to testify." The district court conveyed Cohen's response to Donato, and asked him to advise the court "whether Mr. Cohen accurately states the discussion he had with you regarding the decision not to testify." Donato wrote the court a letter dated June 16, 1998 stating that "the defendant *never* informed defense counsel, that the defendant *did not wish to testify*" and that "this decision not to testify was made by counsel Cohen, and the defendant *did not* have any decision input on this matter." In its decision, the district court was apparently unaware that Donato had sent this letter, as it found that "Donato has not answered" the court's request for his response to Cohen's letter. Therefore, when the district judge made a finding of fact that Cohen's account was credible, he may have assumed that the issue was uncontested.

Nonetheless, even assuming that there was a deficient performance by counsel denying Donato his right to testify, unless Donato's potential testimony could have established a

defense, he cannot demonstrate prejudice. *See Brown v. Artuz*, 124 F.3d at 81. Donato has not presented any evidence of what his testimony might have been, or how it might have affected the outcome of the trial. In light of the considerable evidence against him — 22 witnesses, including seven carjacking victims, three of whom identified him — we find that his testimony would not have been beneficial to his case, and we affirm the denial of this claim by the district court.

On the conflict of interest claim, Donato argues that reversal is warranted under *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994), because the district court failed to inquire into counsel's alleged conflict of interest and did not hold a hearing on the matter. No objection was made before the district court, therefore we review this claim for clear error. *See United States v. Stantini*, 85F.3d 9, 13 (2d Cir. 1996).

Under *Levy*, once a district court is "sufficiently apprised of the possibility of a conflict," it must make inquiry; failure to do so results in automatic reversal. *See id.* at 153. Here, the record reflects that Cohen informed the court and his client during the sentencing hearing that he was leaving private practice for the public sector, without specifying that he was going to work for the Florida Attorney General. Cohen added that his prospective employer was allowing him to continue this and other representations. The court then asked Donato whether he objected to Cohen continuing to represent him on appeal, to which Donato answered, "No problem." It appears that the court may have previously been informed, off the record, of counsel's prospective employment. *See* Sentencing Transcript at 7 (Cohen: "As the Court knows, I am leaving private practice for public practice in September of this coming year.").

On this record, it was reasonable for the district court to conclude that no actual or possible conflict of interest existed. If a conflict existed, counsel would have raised it. Furthermore, an employer such as the United States Attorney's

Office of the Eastern District of New York would never approve an Assistant continuing in the representation of a defendant in the Eastern District. Under these circumstances, we do not find that the district court had "a reasonable awareness of a potential conflict of interest." *Stantini*, 85 F.3d at 14. We find no error in the district court's failure to inquire further. In any event, at oral argument counsel conceded that there was no actual conflict of interest in this case and that even if the court had made an inquiry, it would have discovered no conflict. We therefore do not find that this claim warrants reversal.

On the other hand, we find possible merit to Donato's *pro se* claim that the district court may have erred in calculating his sentence. On the conspiracy count, Donato received a five-level enhancement for possession of a firearm under U.S.S.G. § 2B3.1(b)(2)(C) ("if a firearm was brandished, displayed, or possessed, increase by 5 levels"). He argues that this conduct was charged both as an overt act supporting the conspiracy count, charged in Count One, and as a substantive count of armed carjacking, charged in Count Two. The Presentence Report recommended this five-level enhancement because "possession of a firearm is specifically charged in Count 1 of the superseding indictment."

The overt act of possessing a firearm specifically charged in Count One is"

> On or about March 27, 1993, the defendant ERNESTO QUINTIERI, accompanied by the defendant CARLO DONATO, drove to Great Neck, New York where the defendants CARLO DONATO and ERNESTO QUINTIERI took, by force at gunpoint, a motor vehicle from its driver.

Count Two charges;

> On or about March 27, 1993, within the Eastern District of New York, the defendants CARLO DO-

> NATO and ERNESTO QUINTIERI did knowingly and intentionally take by force, violence and intimidation, from . . . another, a motor vehicle . . . and in committing said act did possess a firearm, to wit, a handgun.

These charges appear to represent the same conduct. If so, there may have been improper double counting if the district court increased the offense level for the conspiracy count because of the firearm possession charged as an overt act in Count One, and then sentenced Donato to a five-year consecutive sentence under section 924(c) for the use and possession of a firearm during the commission of the carjacking charged in Count Two. We therefore remand to the district court for resentencing in light of this order, without prejudice to the government submitting an argument to the district court explaining why this was not double-counting.

We have considered Donato's other claims and find them to be without merit.

The judgment of the district court is hereby AFFIRMED in part and REMANDED in part.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-1547

UNITED STATES of America, Appellee,

- v. -

Carlo DONATO, Defendant-Appellant.

April 23, 1997

Appeal from the United States District Court for the Eastern District of New York (Mishler, *Judge*)

Appearing for Appellant Michael B. Cohen, Boca Raton, Florida.

Appearing for Appellee Michael Cornacchia, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York.

Before WINTER, PARKER, PHILLIPS,* Circuit Judges.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued.

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* The Honorable J. Dickson Phillips, Jr., of the United States Court of Appeals for the Fourth Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby affirmed.

Carlo Donato appeals his conviction, following a jury trial before Judge Mishler, for one count of conspiracy to commit carjacking in violation of 18 U.S.C. § 371 and 18 U.S.C. § 2119, six counts of carjacking in violation of 18 U.S.C. § 2119, and six counts of use of a firearm during commission of a violent crime in violation of 18 U.S.C. § 924(c). The government presented evidence of seven separate carjackings of Mercedes Benz or BMW vehicles in suburban Long Island, all carried out at gunpoint. The jury was thus presented with seven counts of carjacking, seven corresponding firearm counts, and one carjacking conspiracy count. The jury acquitted Donato on one of the carjacking counts and the corresponding firearm count, and convicted Donato on all remaining counts. Donato argues on appeal that his convictions should be reversed on the following grounds: (i) the pretrial identifications were impermissibly suggestive and unreliable; (ii) computer records concerning where the stolen vehicles were manufactured and shipped were improperly admitted; and (iii) there was legally insufficient evidence on the firearm counts charging violations of 18 U.S.C. § 924(c).

For each of the carjackings, the government, in addition to other evidence, presented identification evidence consisting primarily of the victims', and in some cases, eye witnesses', identification of Donato in a photospread. Some of the victims also identified Donato in the courtroom gallery. These pretrial identifications were evaluated by the district court in a hearing pursuant to *United States v. Wade*, 388 U.S. 218 (1967), and deemed admissible. We have stated:

> A district court's determination as to the admissibility of identification evidence should be reversed only upon a showing of clear error. Identification

> evidence must be suppressed if the display was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law.

United States v. Jakobetz, 955 F.2d 786, 803 (2d Cir.), *cert. denied*, 506 U.S. 834 (1992) (internal citations and quotation marks omitted). "Moreover, even a suggestive out-of-court identification will be admissible if, when viewed in the totality of the circumstances, it possesses sufficient indicia of reliability." *United States v. Simmons*, 923 F.2d 934, 950 (2d Cir.), *cert. denied*, 500 U.S. 919 (1991).

Although the evidence relating to the identifications was stronger for some counts than others — indeed the carjacking count on which Donato was acquitted related to an incident in which the victim's identification was rather weak — Donato has failed to present any credible evidence of suggestibility in the identification procedures.

Donato also challenges the admission as business records pursuant to Rule 803(6), Fed. R. Evid., of computer printouts from Mercedes Benz and BMW that related to where the stolen cars were manufactured and where they were shipped and eventually sold. Donato argues that the printouts should not have been admitted because the witnesses through which they were introduced were not "custodians" of those records. Donato's argument lacks merit because Rule 803(6) contains no such requirement. We have stated that:

> the principal precondition to admission of documents as business records pursuant to Fed. R. Evid. 803(6) is that the records have sufficient indicia of trustworthiness to be considered reliable . . . The determination of whether, in all the circumstances, the records are sufficiently reliable to warrant their admission in evidence is left to the sound discretion of the trial court.

Potamkin Cadillac Corp. v. B.R.I. Coverage Corp., 38 F.3d 627, 632-33 (2d Cir. 1994) (quotation marks and citation omitted). "Business records are admissible if witnesses testify that the records are integrated into an office's records and relied upon in its day-to-day operations." *United States v. Mendel*, 746 F.2d 155, 166 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985). We have also held that printouts of computer records can be admitted at trial under Rule 803(6). "A business record may include data stored electronically on computers and later printed out for presentation in court, so long as the 'original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice.'" *Potamkin Cadillac*, 38 F.3d at 632 (quoting *United States v. Hernandez*, 913 F.2d 1506, 1512-13 (10th Cir. 1990), *cert. denied*, 499 U.S. 908 (1991)). In the instant case, BMW employee James Patterson testified that the computer records were made and kept in BMW's ordinary course of business; Mercedes Benz employee Michael Doherty testified similarly concerning the Mercedes Benz records. The district court did not, therefore, abuse its "broad discretion," *Mendel*, 746 F.2d at 166, in admitting these records.

Finally, Donato argues that there was insufficient evidence to convict him of the firearm charges. Under the standard applicable to sufficiency challenges, Donato must demonstrate that, after viewing the evidence in the light most favorable to the government, no "rational trier of fact could have found the essential element of the crime charged beyond a reasonable doubt." *United States v. Jones*, 16 F.3d 487, 490 (2d Cir. 1994) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Each of the victims in the trial below testified that the carjacker pulled a gun on them. Lay eyewitness testimony alone is sufficient to sustain a conviction under 18 U.S.C. § 924(c) for use of a firearm during the commission of a crime. See *Jones*, 16 F.3d at 491. The evidence was, therefore, not only sufficient but quite powerful.

We therefore affirm.